Supreme Court, U.S.
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No. 95-652

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

SARAH A. KIRK, Administratrix of the Estate of KIRK, ALFRED T., deceased, and KIRK, SARAH A., in her own right

Petitioner,

v.

RAYMARK INDUSTRIES INC.; EAGLE-PICHER INDUSTRIES, INC.; KEENE CORPORATION; GARLOCK INC.; OWENS-CORNING FIBERGLAS CORPORATION; CELOTEX CORPORATION; GAF CORPORATION; OWENS-ILLINOIS GLASS COMPANY

OWENS-CORNING FIBERGLAS CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals for the Third Circuit

REPLY OF PETITIONER SARAH A. KIRK TO BRIEF IN OPPOSITION

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I. THE JUDGMENT IN THIS CASE IS RIPE FOR REVIEW

This Court has *generally* awaited final judgment in the lower courts before exercising certiorari jurisdiction, *Virginia Military Institute v. United States*, __ U.S. __, 113 S. Ct. 2431 (1993) (Scalia, J., opinion respecting denial of petition for writ of certiorari) (emphasis added). The question before this Court is the "prudent" course to take. *See id.* The judicially prudent, economical, and sensible course in the present exceptional case is to grant certiorari and address the peremptory challenge issue now.

This course is mandated by both national concerns and upon review of the record in this case.

Nationally, in a post-*Batson v. Kentucky*, 476 U.S. 79 (1986), and post-*Ross v. Oklahoma*, 487 U.S. 81 (1988), world, district courts are required to rule daily on the previously sacrosanct use of peremptory challenges; alleged jury selection constitutional violations require a harmless error analysis; this Court deemed the precise issue here to be an open one; the circuits are split on this issue and the Third Circuit, below, seeks guidance. Judicial economy mandates review now so that clear guidance be provided and uniformity be achieved. The waste in judicial resources as district courts and courts of appeals review and re-review this issue as, Owens-Corning suggests, it "percolates" over the years, is apparent.

In addition, in the instant case, judicial economy would also be preserved by review at this time.

If review by this Court is denied at this time, retrial would occur and encompass both phases of trial with its attendant costs. If this Court rules in favor of Mrs. Kirk at this time, no retrial of the full case would occur.

Should this Court grant this petition and reverse the Third Circuit's decision, the case would be remanded to the Third Circuit for a determination as to whether the two evidentiary errors that occurred during the liability phase were harmless.

If harmless, the initial judgment would stand and no further proceedings would occur. If deemed to be reversible

error, *only* the second, liability phase would have to be retried as no error occurred in the damages phase.[1]

None of the cases cited by Owens-Corning, in support of its interlocutory argument, support denial of review here. None of those cases involve the necessity of a full retrial if certiorari were denied, and that is the crucial judicial economy distinction between those cases and the instant case. *See Virginia Military Institute, supra,* (remand to determine appropriate remedy), *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostock, R.R. Co.,* 389 U.S. 327 (1967) (remand for hearing on contempt issue), *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251 (1916) (remand for accounting of damages).

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1. Anticipating petitioner's argument that the only evidentiary errors identified by the court of appeals occurred in the liability phase of the case and, therefore, a new trial should be limited to the issue of liability, Owens-Corning claims that to do so would be "judicially inefficient". *See* Brief in Opp. at 9 n.1. Indeed, the opposite is true.

Owens-Corning's assertion that a "jury asked to decide the liability issue alone would nonetheless be required to hear much of the same evidence that would otherwise be introduced in the damages phase", Brief in Opp. at 9 n.1, displays a complete lack of understanding of the process and is totally contrary to the record in this case as the evidence presented in each phase of this trial was mutually exclusive.

In this bifurcated trial, two separate and distinct issues were determined in two discrete phases.

In the first phase of trial, Owens-Corning conceded the issue of medical causation and only damages were determined.

Four witnesses testified in the damages phase — Mrs. Kirk, two of her daughters and Mr. Kirk's treating physician, who described the clinical course of Mr. Kirk's cancer.

In the liability phase, four experts and one lay witness testified. The lay witness, a co-worker, established Mr. Kirk's exposure to the Owens-Corning asbestos product, Kaylo. Mr. Kirk's treating physician testified to specific causation of Kaylo. A pathologist, an epidemiologist, (by way of former testimony) and a pulmonologist, (also by way of former testimony) all testified that *all* asbestos fiber types cause mesothelioma.

Owens-Corning called one witness, a pathologist, to rebut this well-established, mainstream testimony.

Therefore, contrary to Owens-Corning's present assertion that "much of the same evidence" would be repeated in the liability phase, (*See* Brief in Opp. at 9 n.1) in fact, none was, nor would be.

Here, if review were denied, an unnecessary complete retrial would occur. Review now, however, might very well preclude any retrial or require only retrial of the liability phase. Therefore, the judgment below is ripe for review.

II. THE JUDGMENT BELOW WAS NOT BASED ON NOR SUPPORTED BY ANY ALTERNATIVE GROUNDS

The reversal and remand ordered by the Third Circuit was based on one issue and only one issue — the remedy for impairment of the statutory right to peremptory challenges. This could not be clearer and is not subject to interpretation. The court of appeals stated, "[i]n light of our decision to remand for a new trial *because the jury was improperly constituted,* we need not address whether any evidentiary errors may be harmless". Pet. App. 28a, n. 18 (emphasis added).

Owens-Corning's statement that the "court of appeals reversed the judgment of the district court on multiple grounds . . ." (Brief in Opp. at 8) is false and misleading. Proceeding from this initial false premise, Owens-Corning then disingenously concludes that it "is entitled to a new trial for reasons wholly independent of the question presented in the petition". Brief in Opp. at 9. This conclusion is contrary to the opinion below.

In explicit language, quoted above, the Third Circuit has declared that the sole basis for reversal was the issue for which petitioner seeks this writ; to wit, the remedy for a denial or deprivation of the right to exercise peremptory challenges. *Id.*

The question of reversal, independent of the peremptory challenge issue, on the two evidentiary issues identified by the court of appeals has never been addressed by the Third Circuit and is not before this Court. How the Third Circuit might rule on that issue is pure speculation, requires fact intensive analysis and is inappropriate in the context of this petition.

Therefore, contrary to Owens-Corning's position, the necessity for further proceedings in the district court, without regard to the jury selection issue, does not exist.

III. THE ISSUE PRESENTED IN THIS PETITION IS OF NATIONAL SIGNIFICANCE

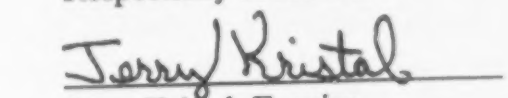
This Court in *Ross v. Oklahoma, supra,* explicity did not address the peremptory challenge remedy issue presented here. Three circuits have now decided this issue. The split in the circuits is irreconcilable and leads to diametrically opposite results. Those results depend solely on the fortuity of where the case was filed.

Courts throughout the country now require the guidance that would be provided by this Court's decision on the merits here. To have inconsistent national law and potentially needless retrials is not prudent. To allow the issue to "percolate", as Owens-Corning suggests, is nothing more than an attempt to preclude Mrs. Kirk from obtaining further review of the judgment Owens-Corning has already exercised its right to have reviewed. The concededly fair and impartial jury's verdict below is entitled to full review now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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